

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY
NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

FEB 10 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

In re the Marriage of:)	
)	
RICHARD S. DOUGALL,)	2 CA-CV 2009-0058
)	DEPARTMENT B
Petitioner/Appellant,)	
)	<u>MEMORANDUM DECISION</u>
and)	Not for Publication
)	Rule 28, Rules of Civil
MYRNA REYES DOUGALL,)	Appellate Procedure
)	
Respondent/Appellee.)	
)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. D-20074351

Honorable Sharon Douglas, Judge Pro Tempore

AFFIRMED

David Lipartito	Tucson
	Attorney for Petitioner/Appellant

Southern Arizona Legal Aid, Inc.	
By Walter Anthony Wisz	Tucson
	Attorneys for Respondent/Appellee

V Á S Q U E Z, Judge.

¶1 Appellant Richard Dougall appeals from the decree of dissolution of his marriage to appellee Myrna Dougall, as well as the trial court's denial of his motions for new trial and reconsideration. He maintains the court erred in awarding Myrna spousal maintenance and abused its discretion in dividing the couple's property and assigning the debts. Finding no error, we affirm.

Background

¶2 Richard and Myrna were married in 1982. In November 2007, Richard filed a petition for dissolution of marriage, in which he stated Myrna's address was unknown. He therefore served her by publication in December of 2007. When Myrna did not file a response, default was entered against her on February 5, 2008, and the trial court ordered the marriage dissolved on March 14, 2008.

¶3 In August 2008, Myrna moved to set aside the default decree, alleging ineffective service of process because Richard had known her address. According to Myrna, she and Richard had been living together from December 2007 until July 2008, at which time he "informed [her] that they were divorced." The trial court set aside the entry of default and "set aside the default judgment," but stated it would "leave in place the order that the marriage is dissolved." After a bench trial, the court awarded Myrna spousal maintenance and divided the couple's property and debts. Richard moved for a new trial or in the alternative for reconsideration. The court ordered supplemental briefing on certain debts that had been incurred in both parties' names, stating it had not addressed those debts in its prior

ruling. With the exception of those debts, which it ordered divided, the court denied Richard's motion. This appeal followed.

Discussion

¶4 Preliminarily, although the exhibits introduced at trial have been provided to this court, the transcripts of the dissolution proceedings have not been made part of the record on appeal. As the appellant, Richard was obligated to “mak[e] certain the record on appeal contains all transcripts or other documents necessary for us to consider the issues raised.” *Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995); *see also* Ariz. R. Civ. App. P. 11(b). In the absence of the transcripts, we will presume they support the trial court's factual findings and rulings, *see Kohler v. Kohler*, 211 Ariz. 106, n.1, 118 P.3d 621, 623 n.1 (App. 2005), and address Richard's claims accordingly.

I. Award of spousal maintenance

¶5 Richard first argues the trial court “lacked jurisdiction to award spousal maintenance” because his “sole source of income [is] his [Veterans' Administration (“VA”)] disability benefits.” He contends a state court lacks authority to divide VA disability benefits because federal law creating the benefits preempts state dissolution law. *See Mansell v. Mansell*, 490 U.S. 581, 587-88, 594-95 (1989). The court awarded Myrna \$750 per month in spousal maintenance until “the death of either party” or Myrna's remarriage. “We review the trial court's award of spousal maintenance for an abuse of discretion.” *Gutierrez v. Gutierrez*, 193 Ariz. 343, ¶ 14, 972 P.2d 676, 681 (App. 1998). And, whether federal law

has preempted state law is a legal issue we review *de novo*. See *E. Vanguard Forex, Ltd. v. Ariz. Corp. Comm’n*, 206 Ariz. 399, ¶ 19, 79 P.3d 86, 93 (App. 2003).

¶6 On the record before us, it appears Richard first raised the argument about the trial court’s purported division of his VA benefits in his motion for a new trial. “An issue raised for the first time after trial is deemed to have been waived.” *Medlin v. Medlin*, 194 Ariz. 306, ¶ 6, 981 P.2d 1087, 1089 (App. 1999). And, preemption issues can be waived by a party’s failure to raise them timely. See *N. Valley Emergency Specialists, L.L.C. v. Santana*, 208 Ariz. 301, n.2, 93 P.3d 501, 503 n.2 (2004). Even if not waived, however, we are not persuaded by Richard’s argument.

¶7 Richard correctly maintains that a state court cannot grant a former non-military spouse a property interest in disability payments to a veteran. *Danielson v. Evans*, 201 Ariz. 401, ¶ 19, 36 P.3d 749, 755 (App. 2001). Pursuant to 10 U.S.C.A. § 1408, a state court may divide disposable retired pay as community property. But, “disposable retired pay” excludes “military retirement pay waived in order to receive veterans’ disability payments.” *Mansell*, 490 U.S. at 589; see also 10 U.S.C.A. § 1408(a)(4)(B), (c)(1). Here, the trial court did not give Myrna a property interest in, or otherwise treat Richard’s VA disability payments as community property.¹ Richard nevertheless maintains the court could not “indirectly burden [his] entitlement to VA benefits” by ordering spousal maintenance that he claims would necessarily be paid out of those benefits. However, none of the cases he

¹We also note that in the absence of a trial transcript we cannot say whether the evidence at trial supported Richard’s assertion on appeal that his only source of income was his VA disability payments.

relies upon supports that position. The majority of those cases do not address spousal maintenance at all, but rather, involve the division of disability benefits as community property or as offsets for community property. *Mansell*, 490 U.S. at 583; *Harris v. Harris*, 195 Ariz. 559, ¶ 13, 991 P.2d 262, 265 (App. 1999); *In re Gaddis*, 191 Ariz. 467, 471, 957 P.2d 1010, 1014 (App. 1997); *Ryan v. Ryan*, 600 N.W.2d 739, 745 (Neb. 1999).

¶8 Although Richard cites *In re Wojik*, 838 N.E.2d 282, 301-02 (Ill. App. Ct. 2005), the Appellate Court of Illinois concluded that state courts were not precluded from considering such disability benefits in awarding maintenance. In particular, the court noted that “the reviewing courts of numerous other states have held that a trial court may properly treat a veteran’s present and future disability benefits as income in determining the veteran’s obligation to pay alimony or maintenance.” *Id.* at 300. In sum, Richard has not met his burden to show that federal law preempts Arizona’s law on this issue and that the trial court therefore lacked authority to award Myrna spousal maintenance. See *E. Vanguard Forex*, 206 Ariz. 399, ¶ 18, 79 P.3d at 92 (“The party claiming preemption ‘bears the burden of demonstrating that federal law preempts state law.’”), quoting *Green v. Fund Asset Mgmt., L.P.*, 245 F.3d 214, 230 (3d Cir. 2001).

¶9 Richard also maintains the trial court “abuse[d] its discretion in finding that [Myrna] was eligible for an award of spousal maintenance under A.R.S. § 25-319(A).” Section 25-319(A) allows a court to order spousal maintenance

for either spouse for any of the following reasons if it finds that the spouse seeking maintenance:

1. Lacks sufficient property, including property apportioned to the spouse, to provide for that spouse's reasonable needs.
2. Is unable to be self-sufficient through appropriate employment . . . or lacks earning ability in the labor market adequate to be self-sufficient.
3. Contributed to the educational opportunities of the other spouse.
4. Had a marriage of long duration and is of an age that may preclude the possibility of gaining employment adequate to be self-sufficient.

The court must then consider numerous other factors in setting the amount and duration of the award, including, *inter alia*, the supporting spouse's ability to pay, the comparative earning power of the spouses, the duration of the marriage, and the contributions of the supported spouse to the supporting spouse's earning ability. § 25-319(B).

¶10 In concluding Myrna was entitled to spousal maintenance in the amount of \$750 per month, the trial court expressly found: (1) the marriage had lasted twenty-seven years and Myrna's age at dissolution "may preclude the possibility of gaining employment adequate to support herself"; (2) the couple had established "a comfortable standard of living" during the marriage; (3) Myrna suffers from chronic depression and a severe gambling addiction; (4) Richard's "income far exceeds that of" Myrna, as does his "income earning ability"; and (5) Myrna "assisted [Richard] in all of his endeavors during their marriage." Although Richard alleged Myrna had lost excessive amounts of money to gambling, the court stated it could not "make a determination that there ha[d] been excessive expenditures" by Myrna.

¶11 According to Richard, “the evidence at trial did not support” the trial court’s finding that Myrna’s age may preclude her from gaining adequate employment. And he asserts no evidence was presented to establish Myrna was entitled to spousal maintenance under any other subsection of § 25-319(A), or to lifetime support in the amount of \$750 per month based on the factors listed in § 25-319(B). Additionally, Richard contends the court improperly assessed his ability to meet his own needs while paying maintenance to Myrna. *See* § 25-319(B)(4). Without a transcript of the trial, however, we must assume the evidence was sufficient to support the court’s findings. *Kohler*, 211 Ariz. 106, n.1, 118 P.3d at 623 n.1. We therefore cannot say the court abused its discretion in awarding Myrna spousal maintenance. *Gutierrez*, 193 Ariz. 343, ¶ 14, 972 P.2d at 681.

II. Property division

¶12 Richard next contends the trial court abused its discretion in determining two parcels of real estate were community property and awarding Myrna an interest in them. He maintains that one of the properties, in Show Low, Arizona, was his separate property because he had acquired it after the marriage was dissolved. And, he argues, the other property—the “Farm Hills property”—was also his separate property because Myrna had “remov[ed] her name from the property.” “The trial court’s apportionment of community property will not be disturbed on appeal absent an abuse of discretion.” *Gutierrez*, 193 Ariz. 343, ¶ 5, 972 P.2d at 679.

¶13 Generally, “[p]roperty acquired by either husband or wife during the marriage” is presumed to be community property. A.R.S. § 25-211(A). “[T]he spouse seeking to

overcome the presumption has the burden of establishing a separate character of the property by clear and convincing evidence.” *Brebaugh v. Deane*, 211 Ariz. 95, ¶ 6, 118 P.3d 43, 46 (App. 2005), *quoting Thomas v. Thomas*, 142 Ariz. 386, 392, 690 P.2d 105, 111 (App. 1984). Property “[a]cquired after service of a petition for dissolution of marriage, legal separation or annulment if the petition results in a decree of dissolution of marriage, legal separation or annulment,” however, is separate property. § 25-211(A)(2). Once a property’s status “as community or separate becomes fixed, it retains that character until changed by agreement of the parties or by operation of law.” *Potthoff v. Potthoff*, 128 Ariz. 557, 561, 627 P.2d 708, 712 (App. 1981). But, “married couples are free to determine at any time what the status of their property is to be” and “spouses may convey their separate or community property interests to one another.” *Bender v. Bender*, 123 Ariz. 90, 93, 597 P.2d 993, 996 (App. 1979).

¶14 According to Richard, the Show Low property was purchased after he served Myrna by publication and the default decree was entered. He argues that because the trial court “did not set aside the . . . dissolution of the marriage,” the property did not fall under the community-property presumption. Indeed, the record includes a deed dated April 25, 2008, which purports to transfer certain Navajo County property to Richard. Even assuming, however, Richard is correct that the relevant date under § 25-211(A)(2) would be the date of his service by publication in December 2007 rather than July 19, 2008 as the court found,

we find no abuse of the court's discretion.² Again, in the absence of the trial transcript, we presume that any testimony presented about the deed supported the court's ultimate conclusion the property was community property. *See Kohler*, 211 Ariz. 106, n.1, 118 P.3d at 623 n.1.

¶15 Likewise, we reject Richard's claim that Farm Hills was his sole and separate property. The record contains a deed purporting to convey Myrna's interest in the property to Richard "as his sole and separate property." Without the trial transcript, however, we must presume testimony presented at trial supported the trial court's ruling that the property retained its community character. *See Kohler*, 211 Ariz. 106, n.1, 118 P.3d at 623 n.1. In sum, we cannot say the trial court abused its discretion in dividing the couple's property.

IV. Assignment of debt

¶16 Finally, Richard asserts "[t]he division of debt was not fair and equitable." He claims that not all of the debt was incurred during the marriage and that "most of the debt, whenever incurred, was incurred by Myrna, . . . but almost all of it was placed in Richard's name." "The trial court has broad discretion to allocate . . . obligations and its decision will not be disturbed absent a clear abuse of discretion." *Nelson v. Nelson*, 164 Ariz. 135, 138, 791 P.2d 661, 664 (App. 1990).

²The trial court stated it had

considered July 19, 2008 as the date of service of the Petition in this matter for the purposes of determining the date of the termination of the parties' community, based upon [Myrna's] assertion in the Motion to Set Aside the Decree that this was the date [Richard] advised her they were divorced.

¶17 “Generally, all debts incurred during marriage are presumed to be community obligations unless there is clear and convincing evidence to the contrary.” *Schlaefel v. Fin. Mgmt. Serv., Inc.*, 196 Ariz. 336, ¶ 10, 996 P.2d 745, 748 (App. 2000). Richard contends he presented evidence, “supported by bank statements, . . . receipts, credit card statements, . . . and other exhibits,” to rebut the presumption, and the record indeed contains at least some of the exhibits to which he presumably is referring. But, because we have not been provided with the trial transcript, we presume the totality of the evidence presented at trial supported the trial court’s ruling that the debts incurred were community in nature, as well as its division of those debts. *See Kohler*, 211 Ariz. 106, n.1, 118 P.3d at 623 n.1.

Disposition

¶18 The judgment of the trial court is affirmed.

GARYE L. VÁSQUEZ, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

J. WILLIAM BRAMMER, JR., Judge